U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Sep2002

CASE NO.: 2002-AIR-00017

In the Matter of

MICHAEL J. HARNOIS
Complainant

v.

AMERICAN EAGLE AIRLINES
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This matter arises from a complaint filed by Michael J. Harnois ("Harnois") who alleges that American Eagle Airlines ("American Eagle") violated section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("the Act") by terminating his employment in retaliation for his actions in making complaints about hazards affecting air carrier safety. The Act prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

I. Background

The Secretary of Labor investigated Harnois's complaint pursuant to 49 U.S.C. § 42121(b)(2), and the parties were notified by letter dated March 21, 2002 that the Secretary had determined that there is insufficient evidence to conclude that there had been any violation of the Act. Thereafter, by letter dated April 15, 2002, Harnois filed a timely request for a formal hearing on his complaint pursuant to 49 U.S.C. § 42121(b)(2)(A).

Upon receipt of Harnois's request for a hearing, the case was referred to the Office of Administrative Law Judges, and a hearing was scheduled for June 18, 2002. Due to a conflict in courtroom assignments, the hearing was rescheduled to June 20, 2002. By letter dated June 5, 2002, American Eagle moved for an order compelling the Complainant to comply with its discovery requests or, in the alternative, for an order that the Complainant to show cause why his complaint should not be dismissed. In an order issued on June 11, 2002, I noted that discovery is

available to parties under the Rules of Practice and Procedure for Administrative Proceedings before the Office of Administrative Law Judges ("The Rules"); 29 C.F.R. §§ 18.13-18.14; and that the Rules are applicable to hearings conducted under the Act. 29 C.F.R. § 1979.107. I also noted that the Administrative Review Board had held that a denial of discovery, even in the name of enforcing time limits to ensure an expedited hearing, deprives a party of its right to a full and fair hearing; *Timmons v. Mattingly Testing Services, Inc*., USDOL/ALJ Reporter (HTML), ALJ No. 95-ERA-40 at 2-3 (ARB June 21, 1996); and I stated that the Respondent's assertions regarding the Complainant's failure to respond to its discovery requests and its inability to contact the Complainant raised a serious question as to whether the case was then in a posture to proceed to hearing. Accordingly, Harnois was ordered to file a written answer to the Respondent's request for an order compelling his compliance with discovery by June 14, 2002 and to show cause in his answer why the hearing should convene as scheduled on June 20, 2002. ALJ Order (June 11, 2002).

Harnois responded to the June 11, 2002 order in a letter dated June 12, 2002, stating that he was unable to comply with the Respondent's discovery requests and was unable to attend a noticed deposition because he did not receive the request or notice until the day before he was to be deposed. Harnois further objected that the discovery time-frames imposed by American Eagle were unreasonable in light of the delay in his receipt of the Respondent's request and notice. Finally, in apparent frustration with the manner in which his complaint was handled prior to its referral to the Office of Administrative Law Judges, and in the apparent belief that he could not receive a fair hearing before any official of the Department of Labor, Harnois moved to withdraw his objection to the Secretary's findings, stating that he might appeal to Congress for an additional investigation of his case by an independent agency. By order issued on June 11, 2002, I concluded that the case was not ready to proceed to hearing as scheduled on June 20, 2002, and I granted American Eagle's request for a continuance, stating that the hearing would be rescheduled to a date in September 2002 in order to allow the parties an opportunity to complete discovery. In addition, I noted that the continuance would provide Harnois with time to consider the benefits of retaining counsel. With regard to American Eagle's discovery requests, I granted its motion to compel and ordered Harnois to produce the requested documents within 30 days. However, I determined that American Eagle had not timely served Harnois with notice of its intention to take his deposition under the Rules, and I directed it to reschedule the deposition and properly serve Harnois with notice of the rescheduled deposition. Lastly, with regard to Harnois's request to withdraw his objections to the Secretary's findings, I determined that approval of a withdrawal request is discretionary under the regulations implementing the Act which provide, in relevant part, that a party may withdraw his or her objections to the findings or preliminary order at any time before the findings or order become final and that "[t]he judge . . . will determine whether the withdrawal will be approved." 29 C.F.R. § 1979.111(c). I further concluded that although neither the Act nor the implementing regulations identify the factors to be considered in determining whether to approve a withdrawal, a judge must, at a minimum, be satisfied that the withdrawal is made knowingly and voluntarily and that withdrawal under the circumstances is not inconsistent with the important policies underlying the Act. In light of Harnois's *pro se* status and the fact that his request to withdraw was based on frustration with the administrative process and

a belief that he would not receive a full and fair hearing, I declined to approve withdrawal. ALJ Order Continuing Hearing, Granting Respondent's Motion to Compel Discovery and Disapproving Withdrawal of Complainant's Objections (June 19, 2002).

Following issuance of the June 19, 2002 order, the Court received a letter from Harnois dated June 3, 2002 which raised several issues. First, it appeared that Harnois had not served the letter on American Eagle, and he enclosed documentary evidence which, he stated, was not to be shared with American Eagle.[1] Harnois also requested to be provided with all information gathered during the investigation of his complaint, including reports which he had previously asked the investigators to obtain from American Eagle. Finally, Harnois requested that the Department of Labor cease any further involvement in his case, alleging bias on the part of the Secretary and her investigator, and he stated that "[i]t is important for the Court to understand that regardless of my request to forfeit my right to appeal *at this time*, my objections to OSHA's findings are withstanding." Complainant Letter (July 3, 2002) at 1 (emphasis in original). By order issued on July 16, 2002, I informed Harnois that the Rules generally require that all documents submitted to the Court be served on all parties of record, and I ordered him to serve all future submissions on American Eagle's attorney. I treated his July 3, 2002 letter as an application for *in camera* inspection of his evidence and a protective order limiting disclosure, and I provided American Eagle with an opportunity to show that the evidence should be made available to it. *See* 29 C.F.R. § 18.46. Regarding his requests for information gathered during the investigation of his complaint, Harnois was directed to the Occupational Safety and Health Administration which investigated the complaint on behalf of the Secretary, and he was advised to serve a request for production of documents on American Eagle if he wished to obtain any reports in their possession. Lastly, I again denied Harnois's request to withdraw his objections but ordered that he could resubmit his request to withdraw of his objections to the Secretary's findings and preliminary order dismissing his complaint with the knowledge that the findings and preliminary order of dismissal would become final and not subject to further review upon approval of the withdrawal. ALJ Order (July 16, 2002).

On July 22, 2002, American Eagle moved to dismiss for cause based on Harnois's failure to comply with the Court's June 19, 2002 order, asserting that Harnois had failed to produce any documents by the July 19, 2002 deadline established by the order for compliance. In an order issued on August 12, 2002, I observed that it appeared from Harnois's prior withdrawal requests and his failure to file a timely answer to American Eagle's motion that dismissal for failure to prosecute may be warranted. Accordingly, I allowed Harnois ten days in which to show cause why his objections and request for hearing should not be dismissed. ALJ Order (August 12, 2002). Harnois has not responded to this order.

II. Discussion

[1] The evidence enclosed with Harnois's letter consisted of receipts for airline tickets which were apparently intended to rebut assertions of non-cooperation made by American Eagle's counsel.

The Rules provide that an administrative law judge has authority to take any appropriate action authorized by the Federal Rules of Civil Procedure. 29 C.F.R. § 18.29(a)(8). Rule 37 of the Federal Rules of Civil Procedure, in pertinent part, states that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . ." Fed.R.Civ.P. 37(b)(2). Although dismissal of an action with prejudice is an authorized sanction, it is generally invoked only as a last resort; that is, "where there is a clear record of delay or contumacious conduct and a lesser sanction would not better serve the interests of justice." *Billings v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML) ALJ Nos. 89-ERA-16 *et seq*. at 2-3 (Sec'y July 29, 1992)), *review denied sub nom Billings v. Reich*, 25 F.3d 1047 (Table), 1994 U.S. App. LEXIS 13250 (6th Cir. 1994) (unpublished opinion); *Tracanna v. Arctic Slope Inspection Service*, USDOL/OALJ Reporter (HTML), ARB No. 97-123, ALJ No. 97-WPC-1 at 5 (ARB November 6, 1997). In my view, the Claimant's failure to either comply with the discovery order or to request an extension of time, along with his repeated requests to withdraw his objections and request for a formal hearing, establish a record of intentional conduct and clearly indicate that lesser sanctions would not be effective. Furthermore, I find that Harnois's failure to respond to the show cause order in light of his repeated withdrawal requests is appropriately viewed as a failure to prosecute his claims warranting dismissal with prejudice. *See Solnicka v. Washington Public Power Supply System*, USDOL/OALJ Reporter (HTML) ARB No. 00-009, ALJ No. 1999-ERA-19 at 3 (ARB April 25, 2000), citing *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962) (courts possess the "inherent power" to dismiss a case for lack of prosecution). *See also Jackson v. Northeast Utilities Co.*, USDOL/OALJ Reporter (HTML), ARB No. 98-041, ARB No. 98-35, ALJ No. 98-ERA-6 at 2 (ARB June 22, 1998) (dismissal for failure to respond to order to show cause); *Staskelunas v. Northeast Utilities Co.*, USDOL/OALJ Reporter (HTML), ALJ No. 98-ERA-8 at 3 (ARB May 4, 1998) (complaint dismissed where complainant's counsel only submitted status inquiry letter after the time period expired for responding to order to show cause). Accordingly, I will grant American Eagle's motion to dismiss.

III. Order

The Respondent's motion to dismiss is GRANTED, and complaint filed by Michael J. Harnois on March 6, 2001 alleging violations of 49 U.S.C. § 42121 is DISMISSED.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor ("Secretary") pursuant to 29 C.F.R. § 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. *See* 29 C.F.R. §§ 1979.109 (c) and 1979.110 (a) and (b).